In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5856

WINSTON M. HOLLOWAY,
RAY LEE WELCH
and
GARY DON CAMPBELL,

Petitioners,

vs.

STATE OF ARKANSAS,

Respondent.

On Writ of Certiorari
to the Supreme Court of Arkansas

BRIEF OF THE OFFICE OF THE COLORADO STATE PUBLIC DEFENDER AS AMICUS CURIAE

ROLLIE R. ROGERS
JAMES F. DUMAS, JR.
THOMAS M. VAN CLEAVE III
1575 Sherman Street
Suite 718
Denver, Colorado 80203
303/892-2661

Counsel for Amicus Curiae
OFFICE OF THE COLORADO
STATE PUBLIC DEFENDER

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The office of the Colorado State Public Defender files this brief as Amicus Curiae pursuant to the written consent of the parties whose consents have previously been filed with the Clerk of the Supreme Court.

INTEREST OF AMICUS CURIAE

(1) The Office of the Colorado State Public Defender is a statutorily created agency of the State of Colorado.[1] Under

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[1] See Title 21, Colorado Revised Statutes (1973).

the statute the sole responsibility for the administration of the Office is vested in the State Public Defender. The State Public Defender employs deputy and assistant public defenders who serve at his pleasure, and establishes such regional offices necessary to carry out his duties. The Office of the State Public Defender has the duty of representing indigent persons accused of felonies, misdemeanors, juvenile delinquency, and involved in mental health proceedings, and appellate and post-conviction proceedings. Under the statute the courts of Colorado have the authority to appoint, on their own motion, the Office of the State Public Defender to represent indigent persons.

(2) During the course of fulfilling its statutory duties, the Office of the State Public Defender has been appointed to represent more than one of several codefendants accused of the same offense. This has taken the form of the same deputy state public defender representing more than one codefendant; different deputy state public defenders from the same regional office representing multiple codefendants; and different deputy state public defenders from different regional offices representing multiple codefendants. It is the position of the Colorado State Public Defender that, in view of the statutory scheme under which the Office operates, the representation of multiple codefendants by one or more deputy state public defenders violates the constitutional rights of the codefendants to the effective assistance of counsel, and further that such joint representation subjects the deputy state public defenders involved to possible disciplinary action under the Code of Professional Responsibility.

(3) The issue involved in this case is of concern to indigent criminal defendants in the State of Colorado.

OPINION BELOW

The Opinion of the Arkansas Supreme Court under the caption of *Holloway v. State* is reported at ____ Ark. ____, 539 S.W.2d 435 (1976).

JURISDICTION

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

Whether the representation of multiple codefendants having conflicting interests by the same attorney deprives one or more of the codefendants of their right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

SUMMARY OF THE ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantee to criminal defendants the right to the effective assistance of counsel for their defense. Representation of multiple codefendants having conflicting interests by the same attorney deprives them of that fundamental constitutional right. Additionally the ethical requirements imposed by the Code of Professional Responsibility render it virtually impossible for an attorney to represent

multiple codefendants in a criminal case and still maintain compliance with the ethical requirements of the Code. To the extent a court-appointed attorney is ordered to represent multiple codefendants in a criminal case, the codefendants' Fourteenth Amendment constitutional right to equal protection of the laws may well be violated, since a retained attorney, without court sanction to violate ethical considerations, would be able to represent only one of the codefendants.

ARGUMENT

THE REPRESENTATION OF THE PETITIONERS WITH CONFLICTING INTERESTS BY THE SAME ATTORNEY DEPRIVED THEM OF THEIR CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee to a criminally accused the effective assistance of counsel for his defense. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932). Where one attorney is appointed to represent multiple codefendants having conflicting interests, that constitutional guarantee, which "contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests," is violated. *Glasser v. United States*, 315 U.S. 60, 70 (1942). In the instant case where counsel for the Petitioners was impaired in his cross-examination of each Petitioner's codefendants by the fact of his joint representation of all of them, the conflict of interest caused thereby deprived Petitioners of their constitutional right to the effective assistance of counsel. *Glasser v. United States, supra; Holland v. Henderson*, 460 F.2d 978 (5th Cir. 1972). See also, *Morgan v. United States*, 396 F.2d 110 (2d. Cir. 1968).

While it is clear that in the instant case the conflicting interests among the several codefendants precluded them from obtaining the effective assistance of counsel, the majority opinion of the Arkansas Supreme Court points up a

pernicious problem in this area: the attempt by various courts to determine whether "prejudice" resulted from the conflict of interest, and if so, whether the prejudice was sufficient to render the representation ineffective. See, *e.g., United States v. Carrigan*, 543 F.2d 1053 (2d Cir. 1976); *United States v. Gaines*, 529 F.2d 1038 (7th Cir. 1976); *United States v. Christopher*, 488 F.2d 849 (9th Cir. 1973); *Fryar v. United States*, 404 F.2d 1071 (10th Cir. 1968). However, these decisions appear to ignore the rather specific language of this Court in *Glasser v. United States, supra*:

> Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness.
>
> To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

315 U.S. at 75-76.

Unfortunately, by requiring a showing of prejudice and then indulging in "nice calculations" as to the amount of prejudice required to render representation ineffective, a myriad of diverse and irreconcilable standards have evolved. Some of the different standards involve differences primarily of semantics. Thus, while some courts require a showing of "prejudice," see *United States v. Carrigan, supra; United States v. Gaines, supra; United States v. Christopher, supra; Fryar v. United States, supra,* in the Fifth Circuit where there is a showing of "actual, significant conflict," prejudice need not be shown. See *United States v. Huntley*, 535 F.2d 1400 (5th Cir. 1976); *Castillo v. Estelle*, 504 F.2d 1243 (5th Cir. 1974). And in the District of Columbia and Third Circuits, the courts appear to use the terms "prejudice" and "conflict of interest" synonymously. See *United States ex rel. Hart v. Davenport*, 478 F.2d 203 (3d Cir. 1973); *Lollar v. United*

States, 376 F.2d 243 (D.C. Cir. 1967). Further confusing the issue are the different degrees of prejudice or conflict of interest required by the various courts to render representation ineffective. See, *e.g., United States v. Carrigan, supra* (in the absence of judicial inquiry as to the conflict, the burden is upon the prosecution to prove lack of prejudice); accord: *United States v. Foster,* 469 F.2d 1 (1st Cir. 1972). *United States ex. rel Hart v. Davenport, supra* (upon a showing of a possible conflict of interest or prejudice, however remote, joint representation is regarded as constitutionally defective).

The foregoing cases illustrate but a few of the various courts' attempts to make "nice calculations as to the amount of prejudice" necessitating a reversal on the basis of ineffective representation resulting from conflicting interests. The result has been utter confusion and prolific litigation. To restore order to the confusion and put an end to the unnecessary litigation, only a simple rule is necessary: absent waiver, require separate counsel for each codefendant. This is not really a completely novel approach:

> It has become increasingly clear that the only way to ensure adequate representation for each defendant in a multi-defendant case is the initiative of the court to require separate counsel as soon as the court is aware of such a situation. The adoption of a rule by each district court, or by action of the court of appeals for the circuit, would solve the problem. . . .
>
> . . . .
>
> Our burgeoning criminal calendars and the need to try a larger percentage of criminal cases under the provisions of the Speedy Trial Act and court rules for the prompt disposition of criminal cases have made it all the more necessary for our federal trial courts to take all measures to avoid the necessity for the retrial of multi-defendant cases. One such measure is to require separate counsel for each defendant in a multi-defendant case.

United States v. Carrigan, supra, 543 F.2d at 1058 (Lumbard, J., concurring). See also, Note: *Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel,* 58 Geo. L. J. 369 (1969).

Arriving at the same conclusion, based as much upon ethical considerations as the constitutional standard for effective representation is the American Bar Association Project on Standards for Criminal Justice:

> Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.

ABA Standards for Criminal Justice, Standards Relating to the Defense Function, §3.5(b), at 211 (1971).

Underlying this section is the recognition of the fundamental fact that in virtually every criminal case involving multiple codefendants there will be at least one phase where their interests conflict. The Commentary to section 3.5(b) notes some of the situations where conflicts frequently occur:

> Beyond the obligation of disclosure, there are situations in which the lawyer's independent representation of his client is so inhibited by conflicting interests that even full disclosure and consent of the client may not be an adequate protection. ABA Code DR 6-106. In criminal cases this most frequently occurs where the lawyer undertakes the defense of more than one co-defendant. In many instances a given course of action may be

> advantageous to one of the defendants but not necessarily to the other. The prosecutor may be inclined to accept a guilty plea from one of the co-defendants, either to a lesser offense or with a lesser penalty or other considerations; but this might harm the interests of the other defendant. The contrast in the dispositions of their cases may have a harmful impact on the remaining defendant; the one who pleads guilty might even, as part of the plea agreement, consent to testify against the co-defendant. Moreover, the very fact of multiple representation makes it impossible to assure the accused that his statements to the lawyer are given in full confidence. Defense counsel necessarily must confront each with any conflicting statements made by the other in the course of planning the defense of the cases. In this situation he may find that he must "judge" his clients to determine which is telling the truth, and his role as advocate would inevitably be undermined as to one if not both defendants.

ABA Standards, supra, at 213-14.

As is recognized by the *Standards, supra*, ethical requirements render the representation of multiple codefendants perilous to the attorney involved and at the same time compound the Sixth Amendment problems for the codefendants. The American Bar Association Code of Professional Responsibility (1969)[1] requires that:

> A lawyer should preserve the confidences and secrets of a client. (Canon 4)
>
> A lawyer should exercise independent professional judgment on behalf of a client. (Canon 5)
>
> A lawyer should represent a client competently. (Canon 6)
>
> A lawyer should represent a client zealously within the bounds of the law. (Canon 7)

[1] Adopted by the Colorado Supreme Court, August 20, 1970. Colorado Revised Statutes, vol. 7, at 617.

> A lawyer should avoid even the appearance of professional impropriety. (Canon 9)

Disciplinary Rule 5-105 is quite specific:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).
>
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
>
> (D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

Ethical Consideration 5-14 amplifies somewhat the requirements of DR 5-105:

> Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

The problem of strict compliance with ethical requirements is especially acute where attorneys are appointed by the court. For while retained counsel may simply decline to

represent more than one codefendant, an attorney appointed to represent multiple codefendants may withdraw only with permission of the court. If the court refuses to allow counsel to withdraw, his only remaining choice – other than risk being held in contempt of court – is which Canon he will violate, albeit with the court's sanction. Where appointed counsel are employed by a public defender office the ethical dilemma is not diminished where separate counsel from the same office, or from different offices in a unitary system, are appointed, since the knowledge and actions of each attorney are imputed to all others in the same office. See Disciplinary Rule 5-105(D) *supra*; ABA Comm. on Professional Ethics, Opinions, No. 33 (1931). See also, *Olds v. State*, 302 So. 2d 787 (Dist. Ct. App. Fla. 1974). The Office of the Colorado State Public Defender has been confronted with this situation on several occasions, where the courts of this jurisdiction have appointed different deputy state public defenders from the same or different regional offices to represent codefendants in the same case. Usually the courts have permitted withdrawal and have appointed counsel from outside the Public Defender Office to represent the conflicting codefendants. See *Allen v. District Court*, 184 Colo. 202, 519 P.2d 351 (1974). However, a decision by this Court which in any way sanctions the joint representation of multiple codefendants would seriously undermine the ability of the Office of the Colorado State Public Defender to obtain leave to withdraw in such cases.

The ethical standards involved may also pose questions of constitutional dimension in areas other than the Sixth Amendment. To the extent that retained counsel may refuse to represent more than one codefendant in the same case because of ethical considerations, while appointed counsel may not, any detriment suffered by the codefendants represented by appointed counsel as the result of the joint representation may violate their right to equal protection of the laws under the Fourteenth Amendment to the Constitution. *Tate v. Short*, 401 U.S. 395 (1971);*Williams v. Illinois* 399 U.S. 235 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

CONCLUSION

The law is clear that the joint representation of multiple codefendants having conflicting interests deprives one or more of the codefendants of their constitutional right to the effective assistance of counsel. The law is not so clear with respect to just what constitutes a conflict of interest, or a prejudicial conflict of interest, whichever term is utilized by a particular court. The confusion results from the courts' attempts to "indulge in nice calculations as to the amount of prejudice" resulting from such conflicts of interests. However, it is increasingly recognized, especially where ethical considerations are applied, that there is virtually no criminal case in which the interests of multiple codefendants do not clash at some point. Thus, the only real solution, and one which would decidedly promote judicial efficiency, is one which would require, in the absence of a valid waiver, the appointment of separate counsel in every criminal case involving multiple codefendants.

Respectfully submitted,

ROLLIE R. ROGERS
(A Member of the Bar of This Court)

JAMES F. DUMAS, JR.
THOMAS M. VAN CLEAVE III
1575 Sherman Street
Suite 718
Denver, Colorado
303/892-2661

Counsel for Amicus Curiae
THE OFFICE OF THE COLORADO
STATE PUBLIC DEFENDER